COMPLIANCE BOARD OPINION NO. 97-9

May 20, 1997

Mr. Conrad Potemra

The Open Meetings Compliance Board has considered your complaint of March 25, 1997, in which you allege several violations of the Open Meetings Act in connection with the meeting of the Commissioners of Poolesville on March 13, 1997. For the reasons stated below, the Compliance Board generally finds no violation of the Act. Specifically, the Board finds that the means of notice for the March 13 meeting satisfied the Act; that the choice of site for the meeting, at Town Hall, did not violate the Act; and that the Commissioners had a lawful basis for closing the meeting. The Board is not able to state an opinion whether all of the discussion was permissibly conducted in closed session.

I

Notice of the Meeting

You complain that, as of noon on the day of the meeting, no notice of the meeting was posted on the door of Town Hall, evidently the customary place for meeting notices to be posted. Furthermore, your complaint continues, no notice of the March 13 meeting had been provided at the prior meeting of the Commissioners, nor was a message about the meeting available to the public on the "Town Hall Bulletin Board," which we gather is a telephonic message system. Finally, you complain that the two reporters who ordinarily cover Poolesville activities were not notified of the meeting.

In a timely response on behalf of the Commissioners, Town Attorney Charles S. Rand states that a notice of the meeting in fact had been posted at 10:00 a.m. on March 13. No earlier posting was possible, Mr. Rand indicates, because the availability of the Commissioners for the meeting was not confirmed until just before that time. A recorded message about the meeting was not left on the "Town Hall Bulletin Board" because of a staff error. Finally, Mr. Rand confirms that the Town had not attempted to notify the reporters of the meeting: "It is not the practice of the Town to call reporters."

The Act's basic requirement is that "reasonable advance notice" be given of any closed or open meeting subject to the Act. §10-506(a) of the State Government Article. A public body may satisfy the notice requirement "by posting ... the notice at a [previously designated] convenient public location at or near the place of the session." §10-506(c)((3). If, as Mr. Rand indicates, the notice was posted on the door of Town Hall,[1] that method of notice was legally sufficient. Notification of reporters who regularly cover the public body is another permissible method, §10-506(c)(2), but it is not obligatory. Neither is any other method of disseminating information about a meeting. Therefore, the Commissioners of Poolesville did not violate the Act by declining to notify reporters about the March 13 meeting or by failing (as a result of staff error) to record a message about the meeting.

Turning from the method of notice to its timing, we have previously held that the statutory phrase "reasonable advance notice" is intended to link the timing of notice to the public body's own scheduling decision: "Advance notice is 'reasonable' if the public is notified of a future meeting promptly after the public body itself has scheduled the meeting. If a meeting is scheduled on short notice, as sometimes will be required by unexpected developments, the person responsible for the scheduling of the meeting must provide the best public notice feasible under the circumstances." Compliance Board Opinion 93-7, at 2 (June 22, 1993).

According to the information provided by Mr. Rand, that is what happened here. The timing of the meeting could not be known until the Commissioners' availability was confirmed. Once it was, the Town Manager promptly posted the notice of the meeting. There is no evidence that notice of a previously scheduled meeting was deliberately withheld until the last minute. Under the circumstances, the Compliance Board finds no violation.

II

Accessible Meeting Site

You complain that the Town Hall, the site of March 13 meeting, is not "handicap accessible," by which we take it that the Town Hall has physical barriers to access by people with mobility impairments. Mr. Rand acknowledges that an open meeting ought to be held at a site accessible to people with disabilities but contends that "where the only purpose of the public session is to close a meeting, it is unreasonable to require that the meeting be

[1] The Compliance Board cannot resolve a factual dispute over whether the notice was or was not posted. For purposes of our legal analysis, we shall accept that it was.

held in barrier-free accommodations." Mr. Rand asserts that the Commissioners would have had to meet at the public school where open meetings are usually held, conduct their vote to close the meeting, and then travel back to Town Hall to hold the closed session.[2]

The Open Meetings Act begins with a statement of public policy that refers to the accessibility of meetings: "Except in special and appropriate circumstances when meetings of public bodies may be closed under the subtitle, it is the public policy of the State that the public be provided with adequate notice of the time and locations and meetings of public bodies, *which shall be held in places reasonably accessible to individuals who would like to attend these meetings*." §10-501(c) (emphasis added). As a statement of public policy, this provision reflects the General Assembly's underlying policy goal, but the balance of the Act contains the specific requirements that public bodies must follow to accomplish the goal. None of these subsequent provisions addresses the physical characteristics of a meeting site or requires that meetings be held in barrier-free facilities.

Perhaps a public body has an obligation under the Americans with Disabilities Act to ensure barrier-free entry to certain public facilities; the Compliance Board cannot comment on this issue, for the Board has no jurisdiction to address ADA requirements. As a matter of the Open Meetings Act, a public body may not deny, through its choice of meeting site, the right of a person with a disability to observe an open meeting — even one that is open only for the brief time that it takes to follow the procedures for closing a meeting. Nevertheless, your complaint affords no basis for the Compliance Board to conclude that the right of any member of the public to observe the Commissioners' closing procedures on March 13 was denied. Had a person in a wheelchair sought to observe the open portion of the meeting in Town Hall, perhaps special arrangements would have been made to assist the individual's entry and thus make Town Hall "reasonably accessible to individuals who would like to [have] attend[ed]" the brief open portion of the March 13 meeting. At any rate, we cannot say that the conduct of the open portion of the meeting at Town Hall in and of itself violated the Open Meetings Act.

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[2] It is not clear to the Compliance Board why a closed session could not simply be held at the school. Whoever attended the brief open session in order to observe the vote could then be asked to leave.

III

Basis for Closing

Your complaint challenges the basis on which the March 13 meeting was closed. Your complaint notes that "the reason for giving for going into executive session was to 'consult with Counsel and staff about potential litigation over water and sewer allocation.'" This justification, you suggest, was used too loosely as a mere "catch-all for executive sessions ...."

In response, the Commissioners point out that the Town had just received a preliminary report that the Town's allocations for water and sewer use exceeded limits set by the State. The Commissioners needed to discuss potential responses to the problem in light of the possibility of State enforcement action or private litigation.

The Commissioners closed the March 13 meeting on the basis of two exceptions. One of these was §10-508(a)(8), which permits a public body to meet in closed session in order to "consult with staff, consultants, or other individuals about pending or potential litigation." The reference to "potential litigation" means that this exception may properly be invoked even if a lawsuit has not been filed. Yet this exception, like all of the others, must be "strictly construed in favor of open meetings ...." §10-508(c). That is why we said in a prior opinion "that the exception may be invoked regarding 'potential litigation' only when suit has been threatened or a realistic possibility of suit is otherwise obvious." Compliance Board Opinion 93-7, at 4. A closed session may not be held, we continued, "merely because someone speculates that a lawsuit is possible ...." Furthermore, "a public body may not close a discussion under §10-508(a)(8) unless the discussion directly relates to the pending or potential litigation." *Id.*

We are not able to decide whether the Commissioners' discussion on March 13 was allowed to be closed under this exception. On the one hand, it is common knowledge that federal or State enforcement actions against municipalities for breach of an environmental requirement are rare and are typically preceded by a lengthy effort at negotiating a compliance agreement short of litigation. On the other hand, we cannot pretend to know whether the situation in Poolesville presents a more concrete possibility of litigation. We agree with Mr. Rand that the Act does not require the Commissioners "to discuss Town exposure to damages in open session, thereby announcing how and by whom they expect suit, and how serious they believe such suit to be." If the prospect of litigation was so concrete on March 13 as to permit a risk

assessment at that level of detail, then the exception was properly invoked. The Compliance Board cannot express an opinion on this point.

The Commissioners also cited §10-508(a)(7), which allows a public body to "consult with counsel to obtain legal advice" in closed session. Even if litigation were not so concrete a prospect as to be "potential," as we have construed the term, nevertheless a lawyer's legal advice often does extend to litigation risks that are less concrete. Therefore, insofar as the Commissioners were receiving legal advice from their attorney about the potential consequences of the report on the over-allocation, the meeting was permissibly closed.[3]

Your complaint also identifies a portion of the Commissioners' minutes that, in your view, suggested discussion in the closed session beyond the confines of the exceptions cited. As we understand the situation, at the closed session Mr. Cochran, the President of the Planning Commission, made a suggestion. The statement that you extracted from the minutes is as follows: "The Commissioners agreed with this plan, and told Mr. Cochran to come back to them with his recommendations." According to the Commissioners, at the closed session Mr. Cochran "simply advised that water and sewer allocations, as well as the draft report and briefing by the Town Engineer, were to be discussed at the Planning Commission's meeting which was to follow immediately .... The Commissioners clearly agreed with him ...."

The Compliance Board cannot tell from the available information whether the interchange between Mr. Cochran and the Commissioners was sufficiently related to "potential litigation" as to justify the discussion during the closed session. Therefore, the Compliance Board expresses no opinion on this point.

OPEN MEETINGS COMPLIANCE BOARD

Walter Sondheim, Jr.
Courtney McKeldin
Tyler G. Webb

[3] The Commissioners point out that, in any event, the issue was fully discussed by the Planning Commission in an open meeting immediately following the Commissioners' closed meeting. The openness of the Planning Commission meeting is commendable. Subsequent discussion of a matter at an open meeting, however, is irrelevant to the question whether an earlier meeting on the same matter was lawfully closed.